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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

No. 273

ENOCH L. JOHNSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

ENOCH L. JOHNSON,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

October Term, 1942

No.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully presents:

I.

SUMMARY STATEMENT OF MATTER INVOLVED.

The petitioner was indicted in the District Court of the United States for the District of New Jersey for a violation of the Revenue Act of 1936, Act of June 22, 1936, c. 690, Section 145 (b), 49 Stat. 1648, which provides, inter alia, that:

". . . Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, . . . be guilty of a felony . . ."

Count I, on which petitioner was acquitted, dealt with his income tax for the year 1935. Count II alleged that petitioner had actually received in 1936 gross income amounting to $92,358.19, which included an item of $62,400.00 from the numbers game, but that he had failed to include this item in his return and had stated his gross income to be $29,958.10. Count III referring to petitioner's 1937 income, contained substantially the same allegations.

Petitioner was convicted on the second and third counts and sentenced to five years imprisonment and to pay a fine of $10,000.00 on each count, the said terms of imprisonment to be consecutive.

Petitioner appealed to the Circuit Court of Appeals for the Third Circuit which, by a divided Court, affirmed the judgment and sentence. It is this judgment which is now sought to be reviewed.

During the course of the trial, the petitioner (1) was excluded from the court room, on the motion of the United States Attorney, after the jury had been withdrawn, pending the determination by the court of the propriety of a further line of cross-examination; (2) was denied the assistance of his counsel, in that upon his return to the court room, he was not permitted, at the request of the United States Attorney and the direction of the court, to be informed of the nature of the argument that had taken place, nor was he permitted to confer with counsel over the necessity and advisability of claiming privilege; (3) was compelled on cross-examination, for the purpose of impeaching his credibility, to testify to an irrelevant collateral crime, of which he had not been convicted, a method of examination contrary to the rule generally applied by federal courts in criminal cases and specifically contrary to the rule previously followed by the Circuit Court of Appeals for the Third Circuit; (4) was permitted to claim his privilege against self-incrimination in refusing to testify as to a collateral crime, but was penalized for

claiming such privilege when the government attorney was permitted to argue to the jury that the refusal to answer for the reason assigned constituted impeaching conduct, and when the court charged the jury that his failure to testify might be considered in testing his credibility and good faith.

II.

BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked (1) under the Fifth Amendment of the Constitution of the United States which grants defendants in criminal cases the privilege against self-incrimination and forbids the deprivation of life, liberty, or property, without due process of law; (2) under the Sixth Amendment of the Constitution of the United States which guarantees to a person charged with crime a speedy and public trial and the right to have the assistance of counsel; and (3) under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938.

The judgment to be reviewed, as above-stated, is the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered on June 30, 1942, affirming the judgment of the United States District Court for the District of New Jersey, entered on August 1, 1941 (R. 267).

III.

QUESTIONS PRESENTED.

1. While a criminal trial is being conducted, is it not a violation of the due process clause of the Fifth Amendment and the guarantee of a speedy and public trial under the Sixth Amendment to exclude the defendant from the court room during an argument between opposing coun-

sel concerning the relevancy and constitutionality of a proposed line of cross-examination of the defendant, even though the jury is not then present?

2. If a defendant, in obedience to a court order withdraws from the court room during an argument upon the propriety of a series of questions which are being put to him as a witness, and his counsel does not object, can the defendant be held to have acquiesced in the court's direction so as to have waived his constitutional rights?

3. Is it not a violation of the Fifth and Sixth Amendments to prevent a defendant, by direction of the court upon the request of the United States Attorney, from conferring with his counsel and being advised as to the subject matter of an argument that took place during his enforced absence and as to the necessity and advisability of claiming his constitutional privilege against self-incrimination?

4. Is it not error for the United States District Court for the District of New Jersey to permit cross-examination of a defendant concerning a collateral crime of which he has not been convicted, for the purpose of affecting his credibility, where such examination is contrary to the settled rule of that district and of federal courts generally?

5. Where a defendant in a criminal trial is permitted by the court to claim his privilege against self-incrimination as to certain questions relating to a collateral crime, is it not a violation of the Fifth Amendment for the court to confirm the argument of the government attorney to the jury by charging that such refusals to answer may be considered in testing the defendant's credibility and good faith?

IV.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

(1) The Exclusion of Petitioner from the Court Room.

The majority opinion in the Circuit Court of Appeals states that, "The question which we have before us in the instant case is one which is extremely difficult to answer", and that, "We can find no federal decision precisely in point".

In the admitted absence of any federal authority, and despite state decisions precisely to the contrary (*Adams v. State of Florida*, 28 Fla. 511, 10 So. 106 (1891); *Tiller v. State*, 96 Ga. 430, 23 S. E. 825 (1895)), the Circuit Court laid down a new rule of law, as follows (R. 248):

> "As we have previously indicated, the right of a defendant to be present when the triers of fact are absent is not an absolute right, but one qualified by a condition that nothing occurs when he is not present which could put him in jeopardy."

This rule was further elaborated thereafter (R. 250):

> "We lay down the rule for this circuit that a defendant must be present in the court room at every stage of the proceeding which requires the presence of the jury. This is an absolute right. He should also be present at every other stage of his trial, from the time the first veniremen is called to the box until judgment is rendered by the court upon the verdict of the jury. If he is not present when the triers of the facts are not present but argument is being had before the court during the course of his trial, he must be deemed to be entitled to a new trial if it be found that any of his rights have been endamaged by his absence".

The question whether a defendant need be present only when the jury is present is of first importance in every criminal trial in the federal courts and is one which has not been, but should be, settled by this Court.

The majority opinion (R. 245) adopted as the guide to its conclusion the decision of this Court in *Snyder v. Massachusetts*, 291 U. S. 97, 78 L. Ed. 674 (1934). The decision in that case was by a Court divided five to four, and since the present opinion of the Circuit Court is the first so to construe and apply the *Snyder* case, and since the Circuit Court is itself divided, this Court should review the question to determine whether the interpretation of the *Snyder* case is the correct one.

To the extent that the decision below finds no impairment of a constitutional right in the exclusion of the petitioner from the court room, it is in conflict with the following decisions of this Court and other Circuit Courts:

Hopt v. Utah, 110 U. S. 574, 28 L. Ed. 262 (1884);
Lewis v. United States, 146 U. S. 370, 372, 36 L. Ed. 1011, 1012 (1892);
Diaz v. United States, 223 U. S. 442, 455, 56 L. Ed. 500, 505 (1912);
Ponzi v. Fessenden, 258 U. S. 254, 260, 66 L. Ed. 607, 611 (1922);
Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674 (1934);
Fina v. United States, 46 F. 2d 643, 644 (C. C. A. 10, 1931);
Ah Fook Chang v. United States, 91 F. 2d 805, 809 (C. C. A. 9, 1937).

(2) Waiver of Petitioner's Constitutional Rights.

The dissenting opinion in the Circuit Court vigorously contests the holding of the majority that petitioner

had waived his rights when, without objection, he left the court room at the direction of the court, saying (R. 266):

> "It is imputing responsibility rather summarily to say that a defendant's unquestioning compliance with a court's order at trial implies his acquiescence in the propriety of the order. Any waiver implied from the defendant's submission under the circumstances should not be invoked to dissipate a constitutional right. Cf. Hopt v. Utah, 110 U. S. 574, 579."

That the dissenting Judge has correctly stated the law and that the majority has fallen into error is evidence by numerous decisions of this Court:

Hodges v. Easton, 106 U. S. 408, 412, 27 L. Ed. 169, 171 (1882);
Lewis v. United States, 146 U. S. 370, 372, 36 L. Ed. 1011, 1012 (1892);
Diaz v. United States, 223 U. S. 442, 455, 56 L. Ed. 500, 505 (1912);
Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 307, 81 L. Ed. 1093, 1103 (1937);
Aetna Insurance Co. v. Kennedy, 301 U. S. 389, 393, 81 L. Ed. 1177, 1180 (1937);
Johnson v. Zerbst, 304 U. S. 458, 464, 82 L. Ed. 1461, 1466 (1838).

In the last cited case, Mr. Justice Black said:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights'."

(3) The Denial of Assistance of Counsel.

The denial by the trial court of the right of petitioner to confer with his counsel and the approval of this action

by the Circuit Court, impaired the petitioner's constitutional safeguards. Numerous decisions of this Court hold that compliance with the constitutional mandate entitling one charged with crime to the assistance of counsel is "an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life and liberty":

Powell v. Alabama, 287 U. S. 45, 68-71, 77 L. Ed. 158, 170-172 (1932);
Johnson v. Zerbst, 304 U. S. 458, 467, 468, 82 L. Ed. 1461, 1468 (1938);
Walker v. Johnson, 312 U. S. 275, 286, 85 L. Ed. 830, 836 (1941);
Smith v. O'Grady, 312 U. S. 329, 334, 85 L. Ed. 859, 862 (1941).

Necessarily the right to assistance of counsel means "effective assistance": *Thomas v. District of Columbia*, 90 F. 2d 424, 428 (D. C. C. A., 1937). The right is "not formal, but substantial": *Johnson v. United States*, 110 F. 2d 562, 563 (D. C. C. A., 1940). It is equally obvious that it includes also the right to consult with counsel at every stage in the proceedings, and this, even though it is the attorney and not the defendant himself, who seeks to confer for purposes of planning the defense: *Thomas v. Mills*, 117 Ohio St. 114, 119, 157 N. E. 488, 489 (1927).

"Vigilant concern for the maintenance of the constitutional right of an accused to assistance of counsel led us to grant certiorari": *Avery v. Alabama*, 308 U. S. 444, 445, 84 L. Ed. 377, 379 (1939).

(4) Impeachment of Petitioner's Credibility.

The majority opinion of the Circuit Court sustained the trial court's approval of a certain line of cross-examination designed to impeach the petitioner's credibility by showing that he had in 1938 received money from the

numbers game, a crime against the law of the State of New Jersey, but one for which he had not yet even been indicted.

This decision is in direct conflict with two very recent opinions of the same Circuit (*Melaragno v. United States*, 88 F. 2d 264 (1937); *United States v. Montgomery*, 126 F. 2d 151 (1942)), and with the rule generally applied by other federal courts.

In view of this conflict on such a substantial and constantly recurring problem, it is most desirable that this Court determine the question finally.

(5) Privilege Against Self-Incrimination.

This phase of the case presents the anomalous situation of a court permitting a defendant to invoke a constitutional privilege and then, in the words of the dissenting Judge, imposing a "legal stigma" on him as a result.

The majority opinion of the Circuit Court held that petitioner was not prejudiced by his claim of privilege, totally ignoring the fact that counsel for the government was permitted to argue to the jury that the refusal to answer constituted impeaching conduct and the charge of the court substantiated that argument.

There is no federal case precisely in point, but see *Phelin v. Kenderdine*, 20 Pa. 354, 363 (1853).

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings herein; and that the judgment of the Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court, and your petitioner have such

other and further relief in the premises as to this Honorable Court may seem meet and just.

WILLIAM A. GRAY,
BENJAMIN M. GOLDER,
Counsel for Petitioner.

JOHN RAUFFENBART,
Of Counsel.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

No.

ENOCH L. JOHNSON,

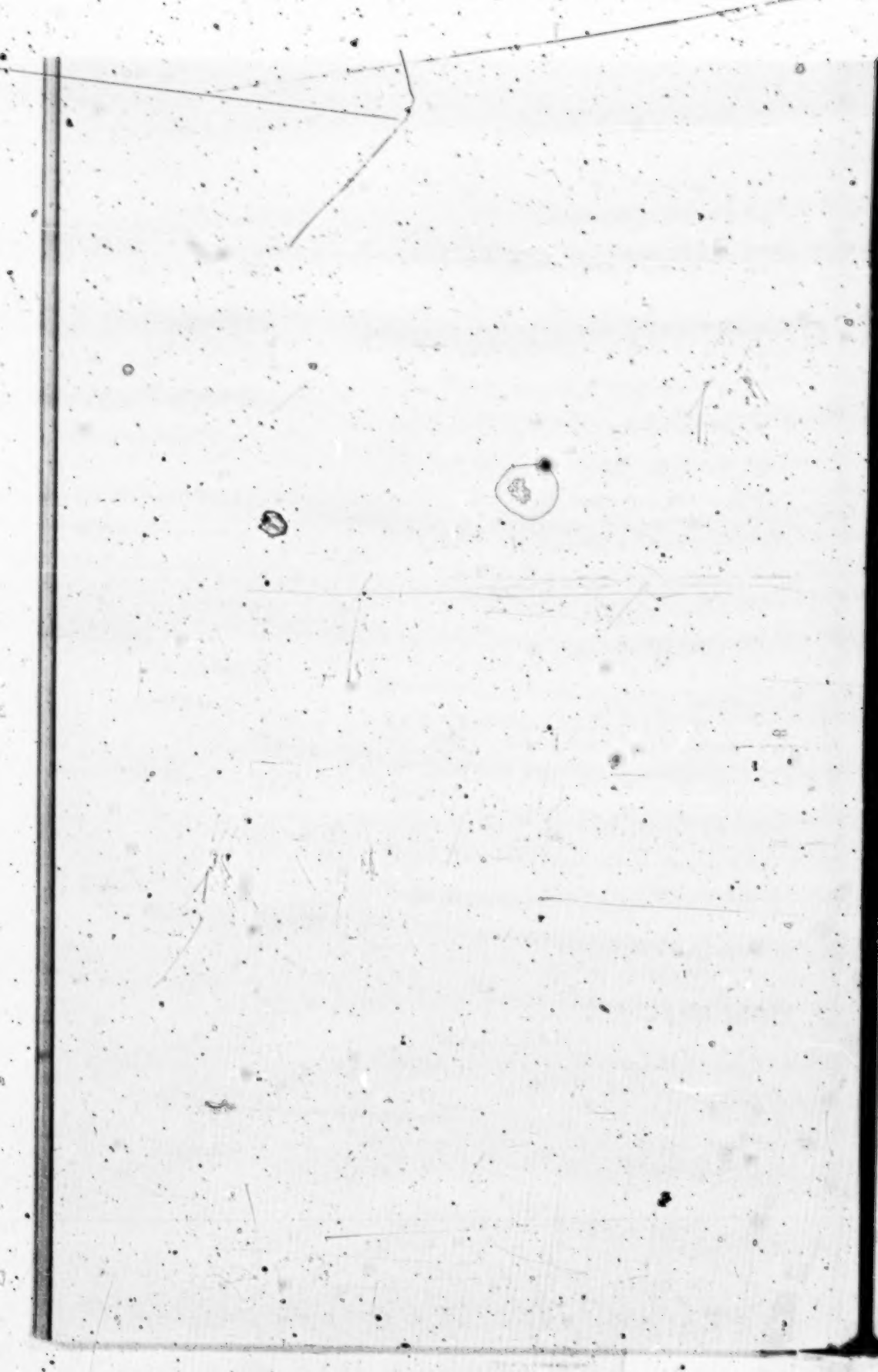
Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.



I. OPINION BELOW.

The opinions for the Circuit Court of Appeals for the Third Circuit, filed June 30, 1942, have not yet been officially reported but a copy is to be found in the record (R. 239).

The oral opinion of the trial court will also be found in the record (R. 39).

II. BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked (1) under the Fifth Amendment of the Constitution of the United States which grants defendants in criminal cases the privilege against self-incrimination and forbids the deprivation of life, liberty, or property without due process of law; (2) under the Sixth Amendment of the Constitution of the United States which guarantees to a person charged with crime a speedy and public trial and the right to have the assistance of counsel; and (3) under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938.

III. STATEMENT OF THE CASE.

Petitioner seeks to review the judgment of the Circuit Court of Appeals for the Third Circuit, filed June 30, 1942, affirming his conviction and sentence entered in the United States District Court for the District of New Jersey on August 1, 1941, after a trial before the Honorable Albert B. Maris and a jury.

The petitioner was found not guilty on Count I of an indictment which charged him with wilfully attempting to evade and defeat his income tax for the year 1935, but was found guilty on Counts II and III charging him with similar crime for the years 1936 and 1937.

Petitioner was sentenced to five years imprisonment and to pay a fine of $10,000 on each count, the terms of imprisonment to be consecutive.

During the course of the trial, the petitioner admitted receiving money from the so-called numbers business for years 1935, 1936 and for the first ten months of the year 1937, which is all the Government proved. On cross-examination, petitioner testified to his custom of sending slips of paper to his secretary containing notations of money received from the numbers game which represented the net amount remaining after certain deductions had been made, and which was reported in his returns as "Commissions" or "Other Commissions". He was asked by the prosecutor whether he had followed this custom in 1938, to which objection was made and exception allowed (R. 53). Then petitioner was asked whether he had received numbers money in 1938, to which objection was made on the grounds that it was irrelevant and tended to prove another crime, and an exception was allowed (R. 53, 54).

At this juncture, the court asked for argument and, after the jury was withdrawn, the following motion was made by the prosecutor (R. 55):

> "Mr. Burns: If the court please, as long as the jury has left the room and is not present I am going to ask that the defendant also be excused from the court room during the argument, and that when he resumes the stand he should do so without having an opportunity to hear what the argument is about and I suggest that he remain in the outer office of the chambers of Judge Avis during the argument.
>
> The Court: I think that is a fair request. You may retire, Mr. Johnson.
>
> (The defendant withdrew.)"

There followed an argument in the course of which

petitioner's counsel contended that the evidence was irrelevant because it related to a separate and disconnected crime, and that it called upon the petitioner to incriminate himself (R. 191). The court ruled that the evidence was admissible on the question of credibility, but that petitioner should be advised of his constitutional right against self-incrimination, without being apprised by his counsel of the subjects discussed in the argument that had taken place and without being permitted to confer with his counsel about the advisability of claiming privilege (R. 190, 197, 202). Petitioner's counsel was granted an exception (R. 201).

Petitioner and the jury were then recalled to the court room and when he resumed the witness stand he was asked whether he had received any numbers money during 1938 (R. 202). At this point, with the approval of the court, his counsel stated to petitioner that he had a constitutional right not to answer questions which might tend to incriminate him (R. 202). He thereupon claimed his privilege (R. 203). He also claimed privilege when asked what money he had used for political purposes during 1938 (R. 204). He was then asked to identify his income tax return for 1938, which he did (R. 206) after an objection was overruled and an exception granted (R. 206). He was asked over objection and exception whether the return for 1938 did not contain an item "other commissions" and answered "Yes" (R. 208). He thereupon was asked what money this item represented, but claimed his privilege (R. 208).

Despite the fact that petitioner had been permitted by the court to invoke his constitutional privilege, the prosecutor in his speech to the jury, commented thereon, as follows (R. 61):

> "Now, ladies and gentlemen, can you believe that man [the petitioner] told you the truth about anything on the witness stand when he admits that he got numbers money in 1938 but won't tell you who he got it from

on the ground that it would incriminate him? If you can believe that that man is innocent of this charge when he stands right up in front of you and says he cannot answer a question about 1938, that he just got through answering for 1937 on the ground that it would incriminate him, well, then, I just don't get it."

Objection was made to this statement and the court instructed the jury, as follows (R. 8):

"Mr. Burns also referred to the fact that Mr. Johnson in cross-examination when asked with regard to whom he received numbers money from in 1938, claimed his constitutional privilege of not being required to answer a question which he felt might tend to incriminate him. Now, that may only be considered by you in testing his credibility as to the answers which he did give and his good faith in the matter. We are not trying Mr. Johnson for anything that he did in 1938, that is not before you, that is an entirely different matter with which you or I have not any concern whatever. We are only considering in this case the years 1935, 1936 and 1937. In so far as any suggestion was made by Mr. Burns that that might be considered for any other purpose, you should disregard it."

IV. SPECIFICATION OF ERRORS.

A specification of the errors intended to be urged has been given in the accompanying Petition under the heading "Questions Presented" (supra, pp. 3, 4) and in the interest of brevity will not be repeated, but is referred to and incorporated herein as though set out at length.

V. ARGUMENT.

1. The Exclusion of Petitioner from Court Room (Question 1).

The Circuit Court has laid down a new rule on what it concedes is an "extremely difficult question" and one on which it has found no federal decision precisely in point. That rule is as follows:

> "We lay down the rule for this circuit that a defendant must be present in the courtroom at every stage of the proceeding which requires the presence of the jury. This is an absolute right. He should also be present at every other stage of his trial, from the time the first venireman is called to the box until judgment is rendered by the court upon the verdict of the jury. If he is not present when the triers of the facts are not present, but argument is being had before the court during the course of his trial, he must be deemed to be entitled to a new trial if it be found that any of his rights have been endanmged by his absence."

The Court, then, in applying its test, concluded that Johnson was not damaged by his exclusion from the court room since the jury was not then present, the question being argued was purely one of law[1] and upon his return he was informed of his constitutional privilege and claimed it immediately.

We submit that this rule is in direct conflict with numerous decisions of this Court, which hold that the requirements of due process under the Fifth Amendment and a speedy and public trial under the Sixth Amendment

[1] An examination of the record will show that the discussion was not purely one of law but of mixed law and fact, and that a number of assertions were made by the prosecuting attorney concerning which petitioner was entitled to be advised and to consult with his attorney (R. 125).

are satisfied only by the presence of a defendant at *every* stage of his trial from the time the jury is empaneled to the rendition of their verdict.

Thus, in *Lewis v. United States*, 146 U. S. 370, 372, 36 L. Ed. 1011, 1012 (1892), Justice Shiras said:

> "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, *nothing*[2] shall be done in the absence of the prisoner."

Further in the opinion, the Court quoted with approval the following language from *Hooker v. Commonwealth*, 13 Gratt (Va.) 763, 766 (1855):

> "It is the right of anyone, when prosecuted on a capital or criminal charge, to be confronted with the accusers and witnesses, and it is within the scope of this right that he be present not only when the jury are hearing his case, but at any subsequent stage when anything may be done in the prosecution by which he is affected."

In *Diaz v. United States*, 223 U. S. 442, 455, 56 L. Ed. 500, 505 (1912), it was said:

> "In cases of felony our courts, with substantial accord, have regarded it [the right to be present] as extending to *every* stage of the trial, inclusive of the empaneling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself."

See also in accord *Hopt v. Utah*, 110 U. S. 574; 28 L. Ed. 262 (1884); *Ponzi v. Fessenden*, 258 U. S. 254, 260, 66 L. ed. 607, 611 (1922).

The Circuit Court of Appeals for the Tenth Circuit in

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[2] Italics are supplied unless otherwise noted.

Fina v. United States, 46 F. (2d) 643, 644 (1931), has adopted the rule here contended for and declared absolute the right of a defendant to be present throughout his trial:

> "We have no doubt but that it is the constitutional right of one accused of a felony, as in this case, to be present at *every* stage of the trial, because the trial by jury mentioned in our Constitution means a trial by jury according to the rules of the common law. The government . . . contends the burden is on defendant to show prejudice. We cannot agree with this contention at all . . . This being a criminal case on a charge of felony, if error is shown to have been committed, prejudice will be presumed, unless the contrary is clearly made to appear. Again, the error here complained of is a denial to defendant of his constitutional right, and the denial to defendant on trial of his rights guaranteed to him by the Constitution is at all times deemed to be prejudicial."

The same view is taken by the Circuit Court of Appeals for the Ninth Circuit in *Ah Fook Chang v. United States*, 91 F. (2d) 805, 809 (1937).

As the guide to its decision, the court below turned to *Snyder v. Massachusetts*, 291 U. S. 97, 78 L. Ed. 674 (1934), which, although decided under the Fourteenth Amendment, the Circuit Court held equally applicable to the Fifth Amendment: *Hurtado v. People of California*, 110 U. S. 516, 535, 28 L. Ed. 232, 238 (1884).

In the *Snyder* case, the question directly presented for decision was whether the Fourteenth Amendment required the defendant to be present when the jury, at the opening of the trial, viewed the scene of the crime together with the judge and opposing counsel, the view being permitted under a Massachusetts statute. This Court, in affirming the conviction, held that the statute did not violate the Fourteenth Amendment in as much as (p. 105):

> "The commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

The Court then decided that the historical concept of a view, existing as it had "for about two centuries, if not longer", could not possibly offend the "traditions and conscience of our people". "The Fourteenth Amendment has not displaced the procedure of the ages." (p. 111)

Holding as it does that a view is not part of the trial and hence that a defendant does not have to be present, the *Snyder* case cannot be said to be in conflict with the position now urged upon the Court. On the contrary, Justice Cardozo indicates that the underlying principle of the right of a defendant to be present "gains point and precision from the distinction everywhere drawn between proceedings at the trial and those before and after". (p. 107)

The majority of the Circuit Court has plucked certain isolated language from Justice Cardozo's opinion and seeks to support its rule thereon (p. 106):

> "It [the presence of defendant] bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend. Nowhere in the decisions of this Court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow."

This language cannot fairly be divorced from the rest of the opinion where the distinction is clearly made "between proceedings *at the trial* and those before and after." Indeed, and it is particularly applicable to the

present case, Justice Cardozo pointed out that "defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself."

In the light of this, it would be an anomaly to insist upon the presence of the defendant at a closing argument when his case may be lost already and to exclude him from some earlier part of the trial when a crucial decision was being made and when his presence and assistance would have been vital. It is no answer to say that petitioner's counsel was present and represented him since petitioner could have advised, made suggestions or even superseded his lawyer; nor is it enough, even if it were so, to dismiss petitioner's contention by saying that only an argument on the law was being had. It is submitted that a defendant has a constitutional right to be present at every stage in his trial, especially where the very strategy of his defense is at stake.

In the words of the dissenting Judge in the Circuit Court (R. 266):

> "Any discriminations or refinements as to what does or does not constitute the trial, once the jury is empaneled, the verdict unreturned and the court in session and actually engaged in a disposition of the matter, are likely only to render that right something less than absolute."

We cannot leave our discussion of the *Snyder* case without referring to the dissenting opinion of Mr. Justice Roberts, in which he was joined by three other Justices. While we have attempted to show that there is nothing in the actual decision of the majority in the *Snyder* case which mitigates against our present contention, we direct this Court's attention particularly to the following lan-

guage of Mr. Justice Roberts as showing the manifest danger of the rule laid down by the court below (p. 136):

> "Nor ought this Court to convert the inquiry from one as to the denial of the right into one as to the prejudice suffered by the denial. To pivot affirmance on the question of the amount of harm done the accused is to beg the constitutional question involved. The very substance of the defendant's right is to be present. By hypothesis it is unfair to exclude him. As this Court has recently said with respect to disregard of the mandate of the Sixth Amendment respecting trial by jury:
>
> > 'But the constitutional question cannot thus be settled by the simple process of ascertaining that the infraction assailed is unimportant when compared with similar, but more serious infractions which might be conceived. . . . It is not our province to measure the extent to which the Constitution has been contravened and ignore the violation, if, in our opinion, it is not, relatively, as bad as it might have been.' "[a]

The rule accepted by the Circuit Court turns largely upon the presence or absence of the jury. It held that a defendant must always be present when the triers of the fact are present but his exclusion when they are not must cause him substantial prejudice in order to constitute reversible error. Now it should be noted that nowhere in any authority is a defendant's right made to depend upon the presence or absence of the jury, and it is not difficult to conceive of a situation in which a trial may be won or lost and a defendant be ultimately freed or imprisoned as the result of a decision made in the absence of the jury. We submit, indeed, that such is the present case, and

[a] Quoting from *Patton v. United States*, 281 U. S. 276, 292, 74 L. Ed. 854, 860 (1930).

even if this Court sees fit to adopt the rule of "substantial prejudice" it should hold that petitioner's cause was fatally harmed by what happened at and resulted from the particular juncture of the trial from which he was excluded. His ignorance of what had occurred, his inability to consult with counsel about statements made by the prosecutor, his lack of advice, at the court's direction, as to the full effect, necessity and advisability of claiming privilege, and the subsequent erroneous charge of the court following the argument made by the government attorney to the jury deprived him of any opportunity of defense and made his conviction a foregone conclusion.

The only state decisions which are closely parallel to the present situation, but which were dismissed by the Circuit Court as "going too far", are *Adams v. State of Florida*, 28 Fla. 511, 555, 556, 10 So. 106, 117 (1891), and *Tiller v. State*, 96 Ga. 430-432, 23 S. E. 825, 826 (1895). Both support the view taken by petitioner which we urge this Court to adopt.

In the *Adams* case the defendant was inadvertently excluded from the court room during the course of an argument at which time the jury was also absent, and yet the court there said:

> "It was early decided in this state, and has been rigidly adhered to in later decision, that the prisoner has the right, and in fact must be present during the trial of a capital case, and no steps can be taken by the Court in his absence. Holton v. State, 2 Fla. 476, 500; Gladden v. State, 12 Fla. 562; Irvin v. State, 19 Fla. 872. There is no doubt about the fact that the accused here was taken from the court room and remained out for at least ten minutes during the discussion of the competency of a witness against him. He has the right to be present and hear questions of law as well as questions of fact discussed, and in fact no steps can be taken in the case in his absence."

The opinion in the *Tiller* case, supra, reaches the same conclusion, saying:

> "It cannot be doubted that the argument of counsel is a stage of the proceedings for the trial is not concluded until after the verdict has been received and recorded. The importance of this particular stage as affecting the accused is obvious, it being a matter of vital concern to him to see and hear everything done and said both for and against him as the trial progresses."

2. Waiver of Petitioner's Rights (Question 2).

The majority of the Circuit Court held that the petitioner had acquiesced in his exclusion from the court room in that no objection was specifically made. However, as the dissenting Judge well says (R. 266):

> "It is imputing responsibility rather summarily to say that a defendant's unquestioning compliance with a court's order at trial implies his acquiescence in the propriety of the order. Any waiver implied from the defendant's submission under the circumstances should not be invoked to dissipate a constitutional right. Cf. Hopt v. Utah, 110 U. S. 574, 579."

Without burdening the Court on this phase of the argument, it is sufficient to say that the view of the dissenting Judge clearly represents the great weight of authority in this Court, as is evidenced by the following citations, which by no means exhaust those available:

Hodges v. Easton, 106 U. S. 408, 412, 27 L. Ed. 169, 171 (1882);
Lewis v. United States, 146 U. S. 370, 372, 36 L. Ed. 1011, 1012 (1892);
Diaz v. United States, 223 U. S. 442, 455, 56 L. Ed. 500, 505 (1912);

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 307, 81 L. Ed. 1093, 1103 (1937);
Aetna Insurance Co. v. Kennedy, 301 U. S. 389, 393, 81 L. Ed. 1177, 1180 (1937);
Johnson v. Zerbst, 304 U. S. 458, 464, 82 L. Ed. 1461, 1466 (1938).

3. Denial of Advice of Counsel (Question 3).

As has been pointed out above, (p. 14) when the petitioner was excluded from the courtroom upon the motion of the prosecuting attorney it was also directed that upon his return he should not be informed of the nature of the argument that had taken place. Accordingly when he did come back his counsel advised petitioner of his constitutional privilege against self-incrimination but could not discuss with him the nature and outcome of the highly important argument that vitally affected the course of the trial, nor could they confer over the effect and advisability of claiming privilege. It was only after the petitioner had resumed the stand and was being cross-examined again that his attorney was permitted to tell him from the bar of the court of the existence of his privilege. Having it put to him in this way, petitioner naturally claimed his privilege.

It is respectfully submitted that this was in direct contravention of the requirements of the Sixth Amendment guaranteeing to one charged with crime the assistance of counsel.

This right, of course, is "not formal, but substantial": *Johnson v. United States*, 110 F. (2d) 562, 563 (D. C. C. A., 1940). In order to have any meaning whatever, the assistance of counsel must mean "effective assistance": *Thomas v. District of Columbia*, 90 F. (2d) 424, 428 (D. C. C. A., 1937). Thus, the term must comprehend that the accused shall have the right not only to be represented by

counsel at the trial, but also the right to confer with him "not merely during the actual stages of the trial, but at every point in the proceedings": *Thomas v. Mills*, 117 Ohio St. 114, 119, 157 N. E. 488, 489 (1927).

It follows from our contention that petitioner had a constitutional right to be present at every stage in the trial that he necessarily had the right to be informed fully about the argument that had taken place. This becomes all the more apparent when it is considered that what had transpired constituted such a crucial point in the trial.

It is true that the cases of *Powell v. Alabama*, 287 U. S. 45, 77 L. Ed. 158 (1932), and *Johnson v. Zerbst*, 304 U. S. 458, 82 L. Ed. 1461 (1938)[4] are concerned primarily with the right of an accused to have counsel in the first instance. However, the underlying rationale of those cases is that defendant is entitled to have "the guiding hand of counsel at *every* step in the proceedings against him": *Powell v. Alabama*, supra, at page 69.

It should be added that the Court in *Powell v. Alabama*, supra, at page 70, indicated that "the right of the accused to the presence, *advice* and assistance of counsel [is] necessarily included in due process of law. 2 Story, Const. 4th ed. § 1949, p. 668".

4. Impeachment of Petitioner's Credibility (Question 4).

The petitioner was indicted for wilfully attempting to evade and defeat his income taxes for the years 1935, 1936, and 1937 and for no other years. We have related above (pp. 13, 14) the successful attempt of the prosecutor, approved by both lower courts, to impeach his credibility, to cross-examine him as to whether or not he had, in 1938, received money from the numbers game, what he had done

[4] See also *Walker v. Johnston*, 312 U. S. 275, 286, 85 L. Ed. 830, 836 (1941), and *Smith v. O'Grady*, 312 U. S. 329, 334, 85 L. Ed. 859, 862 (1941).

with it and whether or not he had used the same "bookkeeping system" as he had in the previous years.

The essence of our argument is that certain questions were asked which were objected to and which the petitioner was then either forced to answer or else to claim his privilege. Those questions on their face related to the commission of other crimes for which he might possibly be indicted at some later time. The approval of this erroneous line of questioning worked further harm as we shall discuss under Point 5.

A further quotation from the dissenting Judge demonstrates the nub of the error made in the trial (R. 259):

> "It is less than clear to me how the matter thus inquired about can be deemed capable of serving as the basis for impeachment. Necessarily, even a possibility of refutation would depend upon how the defendant testified in such regard. If he told the truth, he could hardly be thought to have impeached himself, even though a conflict should incidentally develop upon a comparison of his testimony with extraneous matter. Yet, the irrelevant matter, which on the government's theory would constitute a separate offense for which the defendant was not on trial, would have been heard by the jury. On the other hand, if he testified falsely, the government would not be in position to refute him, for the cross-examiner is bound by the answers which he elicits to questions concerning collateral matter."

See in accord *Cohen v. United States*, 56 F. (2d) 28, 30 (C. C. A. 1, 1932) and *Bullard v. United States*, 245 F. 837, 840 (C. C. A. 4, 1917).

It must be remembered that the questions thus permitted related to offenses for which petitioner had not been, but could be indicted. In approving them the

Circuit Court is in conflict with its own recent decision in *United States v. Montgomery*, 126 F. 2d 151 (1942), which, oddly, it cites in the present case (R. 253 n. 3). The *Montgomery* case also arose in the District Court for the District of New Jersey and there too the question involved was the impeachment of a witness. The Court held (p. 155):

> "It may therefore be taken as the rule that in the trial of criminal cases federal courts are bound by such rules of procedure and evidence as Congress prescribes and such further rules as the federal courts have adopted or from time to time may adopt in the light of general authority and sound reason. So treating with the question raised in the instant case, *we believe the rule with respect to impeachment for former conviction, as generally applied by federal courts in criminal cases, to be that it is only convictions for felony or misdemeanors amounting to crimen falsi which are admissible to impeach a witness' credibility.*"

Melaragno v. United States, 88 F. 2d 264 (C. C. A. 3, 1937), is to the same effect.

A fortiori the trial court and the Circuit Court were in error in permitting a series of questions relating to criminal offenses for which petitioner had not even been indicted, and this trial error led to an even more grievous one.

5. The Perversion of the Privilege Against Self-Incrimination (Question 5).

Our contention is that when the constitutional privilege against self-incrimination is exercised, by invitation of the court, it is absolute; that the question of its exercise is a matter solely between the trial judge and the witness in which the jury has no part; that no inference can

be drawn from its exercise and consequently the jury can not consider it in determining the credibility of the witness who has invoked it.

As has already been described while the petitioner was being cross-examined, the trial court permitted his counsel to tell him that he had a constitutional privilege against self-incrimination, but by reason of the court's further direction, made at the instance of the prosecuting attorney, petitioner and his counsel were prohibited from conferring and discussing the advisability of claiming the privilege. Then, after petitioner, in this unenlightened state, had claimed his constitutional protection, the court not only permitted the government attorney to argue to the jury that the refusal to answer affected petitioner's credibility, but reiterated this devastating infringement of his rights in its charge. In this perverse fashion, his constitutional right, far from affording him protection, boomeranged against him in the most unexpected manner and may fairly be said to have weighed heavily against him.

In passing, we may note that there was perhaps "probable error" in permitting the claim of privilege in the first instance if the trial court and Circuit Court are right in holding that the line of questioning was proper since a defendant witness cannot claim privilege as to a *proper* line of cross-examination.[5]: *Raffel v. United States*, 271 U. S. 494, 497, 70 L. Ed. 1054, 1058 (1926). "But having been allowed by the court so to plead in this case, surely the defendant did not thereby subject himself to impeachment merely because he exercised a privilege which the court, even though mistakenly, accorded to him."[6]

The rule was settled as long ago as *Phelin v. Kenderdine*, 20 Pa. 354, 363 (1853), that:

[5] As has been argued, the questions were highly improper.
[6] Dissenting Opinion, (R. 263).

"When a witness declines answering a question, upon the ground of its tendency to incriminate himself, the objection is addressed to the *Court*, and the decision upon it is to be made by the *Court*, and not by the *jury*. If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it. The exercise of this right by the witness is not under the control of the parties, and no one can be affected by evidence which his adversary fails to produce, and which, therefore, cannot be met or explained by cross-examination, rebutting evidence, or otherwise . . ."[1]

CONCLUSION.

For the reasons set out above, it is respectfully submitted that this case is one which justifies the granting of a Writ of Certiorari and thereafter reviewing and reversing the adverse decision.

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[1] Italicized in the original.